

**Closing the Crime Victims Coverage Gap: Protecting Victims'
Private Records from Public Disclosure Following *Tennessean v.
Metro***

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**CLOSING THE CRIME VICTIMS COVERAGE GAP:
PROTECTING VICTIMS' PRIVATE RECORDS FROM PUBLIC
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By: Daniel A. Horwitz

I. Introduction

In March of 2016, the Tennessee Supreme Court ruled 4–1 that law enforcement’s investigative files are categorically exempt from public disclosure under the Tennessee Public Records Act (“TPRA”) throughout the pendency of a criminal case.¹ The underlying lawsuit pitted a vast media coalition spearheaded by *The Tennessean* against both law enforcement officials and a rape victim who intervened to protect her privacy interests under the pseudonym “Jane Doe.”² Ultimately, the court’s holding represented a resounding victory for law enforcement and a significant setback for Tennessee’s news media, which lost on every substantive claim presented.³ At present, however, how the court’s ruling will affect crime victims’ ability to protect their private records from public disclosure after criminal proceedings have concluded is not yet clear.

Tennessean v. Metro represented the first occasion that the Tennessee Supreme Court has considered when, if ever, crime victims’ private records are protected from public view under the TPRA. Notably, although the case’s central holding—that law enforcement’s investigative records are shielded from disclosure “during the pendency of [a case’s] criminal proceedings and any collateral challenges to any convictions”—provides some measure of protection to crime victims,⁴ significant questions remain

¹ *Tennessean v. Metro.*, 485 S.W.3d 857, 873 (Tenn. 2016).

² *Id.* at 859.

³ *Id.* at 874.

⁴ *Id.* at 873.

unsettled. Specifically, the court's ruling in *Tennessean* potentially establishes a three-part "coverage gap" that creates substantial uncertainty as to whether crime victims' private records are exempt from public disclosure in the following instances:

- (1) if their cases do not result in a plea or a conviction;
- (2) if they are not victims of a sexual offense; or
- (3) if the records that they seek to protect from public disclosure—no matter how personal or private in nature—are not specifically exempted from disclosure by statute.⁵

In a future case, however, the Tennessee Supreme Court is likely to hold that these three categories of records are exempt from disclosure under the TPRA as well. Specifically, the court is likely to find that such records are shielded from public view pursuant to Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40-38-102(a)(1)—two of Tennessee's relatively new "victims' rights" provisions—which collectively establish that crime victims have legally cognizable rights to be protected from "intimidation," "harassment," "abuse," "indignity," and "lack of compassion" throughout Tennessee's justice system.⁶

⁵ See generally *id.*

⁶ See Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, et al. at 6-37, *Tennessean v. Metro.*, 485 S.W.3d 857 (2016) (No. M-2014-00524-SC-R11-CV/); Opening Brief of Intervenor—Appellee Jane Doe at 9-26, *Tennessean v. Metro.*, 485 S.W.3d 857 (2016) (No. M-2014-00524-SC-R11-CV).

II. The Tennessee Public Records Act

As a general matter, all governmental records in Tennessee are considered public records under the Tennessee Public Records Act unless the records are specifically exempt from disclosure by law.⁷ Notably, when the TPRA was first adopted in 1957, it only provided for two such exemptions—one for medical records of patients in state hospitals, and another for military records involving national and state security.⁸ In the half century since, however, the Tennessee legislature has systematically added more than forty additional statutory exemptions to the TPRA, rendering it one of the most exception-laden public records statutes in the nation.⁹

As importantly, the TPRA has also been amended to include a “catch-all” provision that creates several additional exemptions to disclosure.¹⁰ This provision establishes that even if certain governmental records are not protected from disclosure by the TPRA itself, they are nonetheless exempt from disclosure if there is an

The arguments presented in this article reflect many of the arguments that were made to the Tennessee Supreme Court in *Tennessean* both by amici curiae supporting Jane Doe and by Jane Doe herself. *See id.*

⁷ *Memphis Pub. Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994) (noting that section 10–7–505(d) of the Tennessee Code “expressly sets up a presumption of openness to records of governmental entities” and that “the burden is placed on the governmental agency to justify nondisclosure of the records”).

⁸ Act of Mar. 18, 1957, ch. 285, § 2, 1957 Tenn. Pub. Acts 932, 932 (codified as amended at TENN. CODE ANN. §§ 10–7–503 to –506 (2016)); *see also* *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004) (“As originally enacted, the public records statutes excepted only two classes of records from disclosure. These records included the medical records of patients in state hospitals and military records involving the security of the United States or the State of Tennessee.”).

⁹ *See* TENN. CODE ANN. § 10–7–504(a)–(s) (2016).

¹⁰ TENN. CODE ANN. § 10–7–503(2)(A) (2016); *see also* *Swift*, 159 S.W.3d at 571–72.

exemption that is “otherwise provided by state law.”¹¹ Significantly, for purposes of this catch-all provision, “state law” has been interpreted expansively to include state statutes, the Tennessee Constitution, Tennessee common law, rules of court, and administrative rules and regulations.¹²

With respect to shielding crime victims’ records from public disclosure, *Tennessean* recognized that section 10–7–504(q)(1) of the TPRA expressly exempts some crime victims’ records from public disclosure once a defendant has been convicted or pleaded guilty.¹³ Separately, the court held that while criminal proceedings are pending in a given case, Tennessee Rule of Criminal Procedure 16 similarly exempts victims’ records from disclosure under the TPRA’s catch-all provision.¹⁴ In light of these holdings, however, the court’s majority opinion did not address two separate and potentially broader sources of protection for crime victims. Specifically, the court declined to consider arguments raised by both Jane Doe and several amici curiae that the following two provisions protect victims’ private records from public disclosure as well:

- (1) Article I, section 35 of the Tennessee Constitution, which affords crime victims a constitutional right “to be free from intimidation, harassment and abuse throughout the criminal justice system”; and
- (2) Tenn. Code Ann. § 40–38–102(a)(1), which affords crime victims a statutory

¹¹ TENN. CODE ANN. § 10–7–503(2)(A) (2016).

¹² *Swift*, 159 S.W.3d at 571–72 (collecting cases).

¹³ *See Tennessean*, 485 S.W.3d at 859.

¹⁴ *Id.*

right to “[b]e treated with dignity and compassion.”

Thus, whether these provisions operate to fill the tripartite coverage gap left open by *Tennessean*’s majority opinion has yet to be determined.

III. Case Summary

Tennessean v. Metro arose out of a public records request filed by *The Tennessean* in October of 2013.¹⁵ The paper’s request sought access to law enforcement records concerning a high-profile rape that took place at Vanderbilt University and resulted in the arrest and prosecution of four of Vanderbilt’s star football players.¹⁶ Among other things, *The Tennessean* requested access to text messages and videos that had been sent or created by third-party sources.¹⁷ Of particular interest to the media coalition were records involving former Vanderbilt football coach James Franklin, who had contacted the victim by cell phone four days after she was raped while she was undergoing a medical examination.¹⁸

Ultimately, the Metropolitan Government of Nashville (“Metro”) denied *The Tennessean*’s public

¹⁵ *Id.* at 860.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tony Gonzalez, *Attorneys: James Franklin Contacted Victim in Vanderbilt Rape Case*, THE TENNESSEAN (Apr. 30, 2014), <http://www.tennessean.com/story/news/crime/2014/04/29/james-franklin-allegation-surfaces-vandy-filing/8476049/> (“The filing also includes a new allegation about interactions between the alleged victim and former head football coach James Franklin and former director of performance enhancement Dwight Galt—both now at Pennsylvania State University. Referring to records, the attorneys said the victim was contacted by Franklin and Galt during a medical examination four days after the rape to explain “that they cared about her because she assisted them with recruiting.”).

records request, causing the paper to petition for access to the requested records in Davidson County Chancery Court.¹⁹ Thereafter, the victim in the case intervened, arguing that certain records implicating her personal privacy—such as her private cell phone records and a video recording of her rape—were exempt from public disclosure under Tennessee’s victims’ rights laws.²⁰ After a full hearing, the trial court ruled that some, but not all, of the records that *The Tennessean* had requested were public records and had to be disclosed.²¹

Eventually, the case reached the Tennessee Supreme Court.²² Upon review, four of the court’s five justices held that while criminal proceedings remained pending, the Metro Nashville Police Department’s entire investigative file was exempt from public disclosure under Tennessee Rule of Criminal Procedure 16, which governs discovery during criminal prosecutions. Additionally, with respect to the victim’s records, the majority opinion explained: “Our ruling today protects Ms. Doe’s privacy concerns by shielding all of the investigative records from disclosure during the pendency of the criminal proceedings and any collateral challenges to any convictions.”²³ The court also noted that:

At the conclusion of the criminal proceedings, Tennessee Code Annotated section 10–7–504(q)(1) grants protection to Ms. Doe by providing that when a defendant has plead guilty or been convicted of and sentenced for a sexual offense or violent sexual offense specified in Tennessee Code

¹⁹ *Tennessean*, 485 S.W.3d at 860.

²⁰ *Id.* at 860–61.

²¹ *Id.* at 862.

²² *See generally id.*

²³ *Id.* at 873.

Annotated section 40–39–202, the following information is confidential and shall not be disclosed: the victim’s name; home, work and email addresses; telephone numbers; social security number; and any photographic or video depiction of the victim.²⁴

Because it was unnecessary to its holding, the majority declined to address whether any of the records sought by *The Tennessean* would also have been protected from disclosure under one or more of Tennessee’s victims’ rights provisions. This separate argument, however, was adopted in full by Justice Wade in dissent, who wrote:

Both [A]rticle I, section 35 and section 40-38-102(a)(1) . . . qualify as “state law” for purposes of the catch-all exception to disclosure under the TPRA. Exceptions must be recognized pursuant to the catch-all provision when, as here, there is a significant risk that the disclosure of documents will contravene rights guaranteed by provisions in the Tennessee Code and the Tennessee Constitution.²⁵

IV. Victims’ Protections and Potential Gaps in Coverage

With respect to protecting victims’ privacy, the significance of *Tennessean* lies in what it potentially leaves exposed. Under the majority’s opinion, records that a crime victim has provided to law enforcement are only protected from disclosure by Tennessee Rule of Criminal Procedure

²⁴ *Id.*

²⁵ *Id.* at 881 (Wade, J., dissenting) (citations omitted).

16 during the pendency of a criminal case.²⁶ Thereafter, if—but only if—a defendant is “convicted of, and has been sentenced for a sexual offense,” then Tennessee Code Annotated section 10–7–504(q)(1) further provides that:

[T]he following information regarding the victim of the offense shall be treated as confidential and shall not be open for inspection by members of the public:

- (A) Name, unless waived pursuant to subdivision (q)(2);
- (B) Home, work and electronic mail addresses;
- (C) Telephone numbers;
- (D) Social security number; and
- (E) Any photographic or video depiction of the victim.²⁷

Crucially, however, if only these two protections—Rule 16’s “pending criminal case” exemption and section 10–7–504(q)(1)’s “post-sentencing for a sexual offense exemption”—shield victims’ records from disclosure under the TPRA, then three broad categories of crime victims will be left unprotected once criminal proceedings have concluded.

The first category of victims who would be left without the ability to safeguard their private records from public view are those whose cases do not result in a conviction. By its own terms, section 10–7–504(q)(1)

²⁶ *Id.* at 859.

²⁷ TENN. CODE ANN. § 10–7–504(q)(1) (2016).

applies only “[w]here a defendant has plead[ed] guilty” or “has been convicted.”²⁸ Significantly, however, by some estimates, less than four percent of rapes result in a conviction.²⁹ Consequently, if section 10–7–504(q)(1) is the only provision that protects crime victims’ private records from public disclosure after criminal proceedings have concluded, then the approximately ninety-six percent of rape victims whose cases do not result in a conviction have no ability to protect their records from disclosure at all.

Second, even in those rare instances when a conviction is secured, section 10–7–504(q)(1) applies only to victims whose perpetrators are found guilty of committing “a sexual offense or [a] violent sexual offense.”³⁰ Excluded from this category, for example, are victims of domestic violence, who represent a significant proportion of all crime victims.³¹ This omission is similarly critical, because domestic violence victims often will not report their abuse to law enforcement unless they are confident that their private information will be protected.³²

²⁸ *Id.*

²⁹ See, e.g., UK CENTER FOR RESEARCH ON VIOLENCE AGAINST WOMEN 2, https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf (last visited July 22, 2016) (“Since most rapes are not reported to police, the [National Violence Against Women Study] estimated that only 3.4% of all rapes ultimately lead to a conviction for the offender.”).

³⁰ TENN. CODE ANN. § 10–7–504(q)(1) (2016).

³¹ TENNESSEE BUREAU OF INVESTIGATION CJIS SUPPORT CENTER, DOMESTIC VIOLENCE 2013–2015 at 1 (2016), https://www.tn.gov/assets/entities/tbi/attachments/Domestic_Violence_2015_-_Secured.pdf (“A total of 232,031 domestic violence offenses were reported to TIBRS from 2013 to 2015.”).

³² See Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions (Part II)*, STRATEGIES: THE PROSECUTOR’S NEWSLETTER ON VIOLENCE AGAINST WOMEN, May 2013, at 7, <http://www.aequitasresource.com>.

As one scholar has explained, for example: “If domestic violence . . . victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma”³³

Third, even when a victim’s perpetrator is both convicted and convicted of a qualifying sexual offense, the final category of victims who are potentially left out of *Tennessean*’s protections are sexual assault victims who seek to prevent the public from accessing records that are not specifically exempted from disclosure by Tennessee Code Annotated section 10–7–504(q)(1). As noted above, following a defendant’s conviction, section 10–7–504(q)(1) exclusively prohibits disclosure of a victim’s “name,” “home, work and electronic email addresses,” “telephone numbers,” “social security number,” and “photographic or video depiction[s] of the victim.”³⁴ Omitted from these restrictions, however, are myriad highly sensitive and deeply personal records that victims also have a significant interest in keeping private—such as their diaries, e-mails, voicemail, social media records, and text messages.³⁵ In *Tennessean* itself, for example, the victim sought to prevent the public from accessing the private text messages that she had exchanged with her mother after she learned that she had been raped while unconscious the night before.³⁶ If section 10–7–504(q)(1) serves as the sole, comprehensive list of exemptions protecting victims’ records from public

org/Issue_10_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_II_May_2013.pdf.

³³ *Id.*

³⁴ TENN. CODE ANN. § 10–7–504(q)(1) (2016).

³⁵ *Cf. id.*

³⁶ Oral Argument at 14:47, *Tennessean v. Metro.*, 485 S.W.3d 857 (Tenn. 2016), <http://www.tncourts.gov/courts/supreme-court/arguments/2015/05/28/tennessean-et-al-v-metropolitan-government-nashville-and>.

disclosure following a criminal conviction, however, then these profoundly private records would all become available for public scrutiny the moment that criminal proceedings come to an end.

Because the records that Jane Doe sought to protect in *Tennessean* were not yet subject to being revealed due to the pending nature of the criminal proceedings in her case, the court's majority opinion did not address any of these potential gaps in coverage. Recognizing its many interstices, however, Justice Wade cautioned: "When the criminal prosecution concludes, the protections of Rule 16 expire. At that point, absent any other exception, the public records pertaining to the rape will be subject to public disclosure, including data from the victim's cell phone and video recordings of the alleged rape."³⁷ Further, Justice Wade emphasized several of the aforementioned limitations of section 10-7-504(q)(1), noting:

[T]his provision applies only if the defendants either plead guilty or are convicted at trial. [Additionally], the materials exempt from disclosure are limited. For example, the statute would not protect statements by or about the victim; written descriptions of photographs and videos of the victim; or most content of the victim's cell phone.³⁸

Accordingly, Justice Wade held in dissent that: "I believe that the victim of the alleged rape is entitled to an adjudication of her claim that public disclosure of the police records would violate her statutory and

³⁷ *Tennessean*, 485 S.W.3d at 882 (Wade, J., dissenting).

³⁸ *Id.*

constitutional rights [under Tennessee’s victims’ rights provisions].”³⁹

V. Looking Forward

Based on *Tennessean*’s holding with respect to Tennessee Rule of Criminal Procedure 16, the records that Jane Doe sought to protect were not yet at risk of being revealed because criminal proceedings were still pending in her case.⁴⁰ As a result, *Tennessean*’s majority opinion did not consider her argument that Article I, section 35 of the Tennessee Constitution—which affords crime victims a constitutional right “to be free from intimidation, harassment and abuse throughout the criminal justice system”—constitutes an independent exemption to disclosure under the TPRA.⁴¹ Nor did it address her

³⁹ *Id.* at 877.

⁴⁰ *See id.* at 873.

⁴¹ TENN. CONST. art. I, § 35. Although the terms of Article I, section 35 reference “the criminal justice system” only, several arguments support the conclusion that its terms are not restricted to criminal proceedings. *See* Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, *supra* note 6, at 10–13. *But see* Media Coalition/Appellants’ Response to Brief of Intervenor-Appellee Jane Doe at 2, *Tennessean v. Metro.*, 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV/) (arguing that the rights afforded to victims by the Tennessee Constitution and the Victims’ Bill of Rights “are limited to the criminal justice system and do not apply to Public Records Act requests.”); Application of Petitioners for Permission to Appeal at 4 n.4, *Tennessean*, 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV/) (arguing that “[t]he alleged victim has identified no substantive rights applicable in a *civil case* under the Public Records Act to preclude the disclosure of public records.”). First, records of criminal proceedings are “inextricably intertwined with the criminal justice system” even when sought in a civil case. Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, *supra* note 6, at 11. Second, “in order to be of any value at

argument that Tennessee Code Annotated section 40–38–102(a)(1)—which affords crime victims a statutory right to “[b]e treated with dignity and compassion”—provides such an exemption as well.⁴² In a future case, however, the Tennessee Supreme Court is likely to hold that these provisions operate to fill the coverage gaps referenced above for three reasons.

First, the only two jurists in Tennessee who have squarely addressed the arguments that Article I, section 35 and Tennessee Code Annotated section 40–38–102(a)(1) exempt crime victims’ private records from public disclosure under the TPRA have wholeheartedly embraced them, providing the beginnings of precedent to support that conclusion.⁴³ Second, while declining to confront the matter directly, *Tennessean*’s four-member majority expressed significant concerns about the potentially devastating consequences that could result from allowing crime victims’ private records to become public, suggesting

all, the rights guaranteed to victims by Article I, section 35 must be held to extend to civil actions.” *Id.* at 12. Such a holding also would not be at all unique. For example, although the Fifth Amendment to the United States Constitution provides that: “No person shall be . . . compelled in any criminal case to be a witness against himself . . .”, the U.S. Supreme Court has explained that its protections may be asserted “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Id.* (quoting *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972)). Additionally, given that *Tennessean* itself makes clear that Tennessee Rule of Criminal Procedure 16 applies in civil cases, there is no logical reason why the rights guaranteed by Article I, section 35 of the Tennessee Constitution should not similarly apply in civil proceedings. *Id.* at 13.

⁴² TENN. CODE ANN. § 40–38–102(a)(1) (2016).

⁴³ See *Tennessean*, 485 S.W.3d at 881–82 (Wade, J., dissenting); see also *Tennessean v. Metro.*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *6 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting).

that such arguments are likely to carry purchase.⁴⁴ Third, there is strong evidentiary support for the conclusion that exposing crime victims' private records to the public could result in victims experiencing intimidation, harassment, abuse, indignity, or lack of compassion in many instances—five consequences that Article I, section 35 and Tennessee Code Annotated section 40–38–102 expressly aim to prevent.⁴⁵

A. Uniformity of Prior Judicial Decisions

To date, the only two judges in Tennessee who have squarely considered litigants' arguments that Article I, section 35 and Tennessee Code Annotated section 40–38–102 independently exempt crime victims' private records from public disclosure have wholeheartedly embraced them, providing the beginnings of precedent to support such a holding.⁴⁶ As indicated above, in *Tennessean* itself, Tennessee Supreme Court Justice Gary Wade held without equivocation that: “Both [A]rticle I, section 35 and section 40–38–102(a)(1) . . . qualify as ‘state law’ for purposes of the catch-all exception to disclosure under the TPRA.”⁴⁷ Further, Justice Wade made clear that these provisions are considerably more expansive than Tennessee Code Annotated section 10–7–504(q)(1) in that they protect a larger body of records from disclosure and also “apply both during and after the prosecution.”⁴⁸

Significantly, in this regard, Justice Wade's opinion also mirrored Judge Neal McBrayer's separate opinion in the Tennessee Court of Appeals. There, in a similarly

⁴⁴ See *Tennessean*, 485 S.W.3d at 873–74.

⁴⁵ TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102 (2016).

⁴⁶ See *supra* note 43 and accompanying text.

⁴⁷ *Tennessean*, 485 S.W.3d at 881 (Wade, J., dissenting) (citing *Swift v. Campbell*, 159 S.W.3d 565, 571–72).

⁴⁸ *Id.* at 882.

victim-protective dissent, Judge McBrayer held that “victim’s rights under Article 1, § 35 of the Tennessee Constitution and Tennessee Code Annotated sections 40–38–101 through 506 . . . constitute ‘state law’ exceptions to the Public Records Act.”⁴⁹ Additionally, because both Justice Wade’s and Judge McBrayer’s colleagues resolved the case on alternative grounds in both instances, no other judge has yet weighed in on this question. Accordingly, among the admittedly small number of Tennessee jurists who have addressed the matter to date, the conclusion that Tennessee’s victims’ rights provisions independently exempt crime victims’ private information from public disclosure is currently unanimous.

B. The Majority’s Concern for Victims’ Privacy

Tennessean’s majority opinion and Justice Kirby’s separate concurring opinion also indicate that the four remaining justices were similarly attuned to crime victims’ privacy interests. For example, although unnecessary to its holding, *Tennessean’s* majority opinion editorializes: “The General Assembly wisely enacted [an] exception to the Public Records Act to protect the release of a victim’s private information and any photographic or video depictions without the necessity of a court proceeding.”⁵⁰ Curiously, the court’s majority opinion also goes out of its way to criticize Justice Wade’s comparatively victim-protective dissent for being insufficiently attuned to victims’ privacy concerns, bemoaning that: “The dissenting justice expresses concern for Ms. Doe and her right to be treated with ‘dignity and compassion,’ Tenn. Code Ann. §

⁴⁹ *Tennessean v. Metro.*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *6 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting).

⁵⁰ *Tennessean*, 485 S.W.3d at 873–74.

40–38–102(a)(1), yet would throw open the police department's investigative records for all to see.”⁵¹

Further, Justice Kirby’s separate concurring opinion emphasizes that absent a robust exemption to protect victims’ private records, “[v]ictims of sexual crimes could find their personal information, as well as videos and photos of their ordeal, readily available to those who would post the information online or otherwise further torment them.”⁵² Importantly, as detailed in the following section, these are also among the specific concerns that Tennessee’s victims’ rights provisions aim to address. Thus, with victims’ privacy concerns weighing heavily on the minds of the majority’s justices as well, the notion that the Tennessee Supreme Court would leave open the three glaring coverage gaps referenced in this article’s introduction seems unlikely.

C. The Likelihood of Intimidation, Harassment, Abuse, Indignity, or Lack of Compassion

Most importantly, the argument that exposing crime victims’ private information to the public could contravene the rights guaranteed to victims by Article I, section 35 and Tennessee Code Annotated section 40–38–102 is remarkably persuasive in many instances. In particular, a significant body of social science evidence supports the conclusion that releasing sexual and domestic violence victims’ private information to the public would frequently result in such victims experiencing “intimidation,” “harassment,” “abuse,” “indignity,” or “lack of

⁵¹ *Id.* at 873 n.24. Given Justice Wade’s express holding regarding victims’ rights and his additional observation that trial courts have the authority “to issue protective orders placing discoverable materials under seal when necessary . . . to protect the rights of the victim,” however, such criticism was unfounded and seriously misplaced. *Id.* at 881 n.3 (Wade, J., dissenting).

⁵² *Id.* at 874 (Kirby, J., concurring).

compassion”⁵³—five consequences that Article I, section 35 and Tennessee Code Annotated section 40–38–102 expressly prohibit.⁵⁴ Thus, given that each of these consequences provides an independent basis for exempting a crime victim’s records from public disclosure, it is likely that at least one of them will be identified as an exemption under the TPRA’s catch-all provision in a future case.

Despite their alarming frequency, crimes involving sexual assault and domestic violence are among the most chronically underreported crimes in the country.⁵⁵ In 2000, only an estimated one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalking offenses perpetrated against females by intimate partners are reported to law enforcement.⁵⁶ Significantly, a critical factor that contributes to such underreporting is “fear of reprisal if [victims] report.”⁵⁷

Fear of reprisal is precisely the type of intimidation that is prohibited by Article I, section 35.⁵⁸ Moreover, there

⁵³ See *infra* notes 55–77 and accompanying text.

⁵⁴ TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

⁵⁵ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 11 (2003), <http://www.bjs.gov/content/pub/pdf/cv03.pdf>.

⁵⁶ PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE & CTRS. OF DISEASE CONTROL & PREVENTION, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 51 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

⁵⁷ RICHARD FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 8 (2005) (citations omitted) (citing Simon I. Singer, *The Fear of Reprisal and the Failure of Victims to Report a Personal Crime*, 4 J. QUANTITATIVE CRIMINOLOGY 289, 289–302 (1988), <https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf>).

⁵⁸ See TENN. CONST. art. I, § 35. Tennessee Code Annotated section 40–38–102(a)(2) further provides that: “All victims of crime and prosecution witnesses have the right to: . . . Protection and support with prompt action in the case of intimidation or retaliation from the

is reason to believe that such fear constitutes the rule, rather than the exception. In total, “almost nine out of ten American women (86%) [believe that] victims would be less likely to report rapes if they felt their names would be disclosed by the news media.”⁵⁹ Consequently, without being able to rely on a public records exemption, “[t]he prospect of having to reveal [private] information . . . [may] make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance.”⁶⁰ Thus, “[i]f domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma”⁶¹

Unfortunately, harassment significantly contributes to such underreporting as well.⁶² Claims against athletes, in particular, have generated many well-documented instances of harassment when a victim’s identity is publicly known⁶³—a consequence that Article I, section 35 of

defendant and the defendant's agents or friends.” TENN. CODE ANN. § 40–38–102(a)(2) (2016).

⁵⁹ NAT’L VICTIM CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992), <http://victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0>.

⁶⁰ Nat’l Crime Victim Law Inst., *Protecting Victims’ Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN (Sept. 2014) at 1, <https://law.lclark.edu/live/files/18060-quashing-pretrial-subpeonasbulletinpdf>.

⁶¹ Kristiansson, *supra* note 32.

⁶² See, e.g., Andre Rouillard, *The Girl Who Ratted*, HUFFINGTON POST (June 17, 2014), http://www.huffingtonpost.com/andre-rouillard/the-girl-who-ratted_b_5168203.html (documenting extensive harassment experienced by rape victim).

⁶³ See, e.g., Associated Press, *Roethlisberger Accuser Receives “Over 100” Threats*, THE NEWS CENTER (Aug. 6, 2009), <http://www.thenewscenter.tv/sports/headlines/52599607.html?device=phone&c=y> (“The woman who has accused Pittsburgh Steelers quarterback Ben Roethlisberger of raping her at a Lake Tahoe hotel-casino where she worked told authorities she has received dozens of

Tennessee’s Constitution similarly forbids.⁶⁴ Notably, such harassment also took place during the criminal proceedings at issue in *Tennessean* itself—making this concern all the more salient when it comes to protecting Tennessee’s crime victims from further molestation throughout the judicial process.⁶⁵

Regrettably, the abusive practice of “victim blaming” also remains frighteningly persistent in society, and it is especially pervasive in the context of sexual assault cases. As one court recently explained:

Historically, an exaggerated concern for female chastity and a regrettable inclination to blame the victim for sexual assaults, along with society’s general respect for sexual privacy, have resulted in an atmosphere in which victims of sexual assault may experience shame or damage to reputation. It would be callous to pretend that this atmosphere has entirely dissipated, or to insist that victims of such assault lack privacy interests because most people today

threatening and harassing phone calls.”); Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR (Mar. 19, 2013, 10:44 AM), <http://www.npr.org/blogs/thetwo-way/2013/03/19/17472>

8448/two-steubenville-girls-arrested-after-allegedly-threatening-rape-victim (“The 16-year-old girl raped by two Ohio high school football players in a crime that has attracted wide attention has also been the victim of online harassment, the state’s top prosecutor said late Monday.”).

⁶⁴ See TENN. CONST. art. I, § 35.

⁶⁵ See *Prosecutor: Someone Trying to Intimidate Vanderbilt Rape Victim*, WSMV (Feb. 24, 2014, 8:33 PM), <http://www.wsmv.com/story/24810836/someone-trying-to-intimidate-alleged-vandy-rape-victim-prosecutor-says> (last updated Aug. 25, 2014 8:34 PM).

understand that the attacker, not the victim, should be stigmatized and ashamed.⁶⁶

Sadly, the genesis of victim blaming in sexual assault cases is probably the law itself⁶⁷—a vestige of “special requirements for rape prosecutions” that once included, for example, rules such as “the requirement of a cautionary instruction to all juries, alerting them that rape complaints are easy to fabricate” and “rules of evidence deeming the complainant’s past sexual conduct or reputation for chastity relevant to her credibility or her consent to sexual intercourse.”⁶⁸ Perhaps most despicably, courts once applied “the requirement of ‘utmost resistance’” to rape prosecutions, which provided that in order to sustain a conviction, “[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration

⁶⁶ Doe v. Del Rio, 241 F.R.D. 154, 159 (S.D.N.Y. 2006).

⁶⁷ The origin of “victim blaming” appears to be attributable to a historical belief that sex outside of marriage was presumptively criminal. As Professor Anne M. Coughlin has explained:

Since, under our ancestors’ system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime. A court would be receptive to such a plea only if the woman could establish that, although she had participated in a sexual transgression, she did so under circumstances that afforded her a defense to criminal liability.

Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 8 (1998) (footnote omitted).

⁶⁸ JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 867 (6th ed. 2008).

of her person, and this must be shown to persist until the offense is consummated.”⁶⁹

Fortunately, however, in recent decades, courts across the United States have shed these biases and have come to recognize that sexual assault represents an especially egregious crime that can undermine the dignity of victims.⁷⁰ Commendably, Tennessee law in particular is not blind to the indignity of sexual assault or to the public’s interest in preventing invasions of survivors’ privacy.⁷¹ Additionally, there is evidentiary support for the conclusion that identifying victims publicly and releasing records of their assaults can lead to re-victimization and recurring trauma that may further chill reporting⁷²—repercussions

⁶⁹ *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

⁷⁰ *See, e.g.*, *Braswell v. State*, Nos. A–2448, A–2529, 1991 WL 11650678, at *7 (Alaska Ct. App. Feb. 6, 1991) (noting that “sexual assault violates the victim’s personal sanctity and dignity”); *People v. Luna*, 204 Cal. App. 3d 726, 749 (1988) (noting “the revolutionary change that has taken place in our society, including changes with respect to the credibility and dignity we extend to adult women and children who are the victims of sexual assault”); *Deborah S. v. Diorio*, 583 N.Y.S.2d 872, 881 (N.Y. Civ. Ct. 1992), *aff’d*, 612 N.Y.S.2d 542 (N.Y. App. Div. 1994) (“While more rape victims are choosing to ‘come out’ [publicly] . . . that choice of dignity must remain with the victim, who must cope with: post-rape trauma; nightmares; possible unwanted pregnancy; terrifying concern about infection with the HIV virus; and loss of a sense of personal security.”).

⁷¹ *See, e.g.*, *State v. Johnson*, No. W2011–01786–CCA–R3–CD, 2013 WL 501779, at *12 (Tenn. Crim. App. Feb. 7, 2013) (“An assault charge, which would be the resulting conviction if there was no ‘sexual contact’ element, would not . . . protect the dignity of the victims of such egregious acts.”); TENN. R. EVID. 412 cmts. (noting that Tennessee Rule of Evidence 412 endeavored to protect “the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy”).

⁷² *See, e.g.*, National Crime Victim Law Institute, *Allowing Adult Sexual Assault Victims to Testify at Trial Via Live Video Technology*, VIOLENCE AGAINST WOMEN BULLETIN, Sept. 2011, at 1–2, <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify> (“[R]ecalling horrifying and personal details of the rape forces

that are plausibly among the indignities that section 40–38–102(a)(1) aimed to prevent, as well.⁷³

In light of these concerns and others, “[o]ver the last thirty years, every state has enacted some form of victims’ rights legislation and nearly two-thirds have passed amendments to their state constitutions granting victims’ rights in the criminal justice process.”⁷⁴ This wave of reform was precipitated in no small part by the fact that “many studies indicate[d] that victims [we]re often more affected by their treatment throughout the course of their limited involvement in the prosecutorial process than by the crime itself.”⁷⁵ Accordingly, courts across the nation have begun to treat crime victims—and sexual assault and domestic violence victims in particular—with significantly greater compassion in an effort to “protect them from a second victimization by the judicial process.”⁷⁶

the victims to relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring and to re-experience a lack of control and terror.” (citations omitted) (internal quotation marks omitted)); National Crime Victim Law Institute, *Protecting Victims’ Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN, Sept. 2014, at 1, <https://law.lclark.edu/live/files/18060-quashingpretrial-subpeonasbulletinpdf> (noting that “[t]he prospect of having to reveal [personal] information to anyone . . . may cause a victim to feel re-victimized and make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance”).

⁷³ The federal Crime Victims’ Rights Act, which bears many similarities to Tennessee’s Crime Victims’ Bill of Rights, also reflects these concerns. See 18 U.S.C.A. § 3771(a)(8) (2015) (guaranteeing crime victims “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy”).

⁷⁴ Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 83 (2010) (footnote omitted).

⁷⁵ *Id.* at 82 (footnote omitted).

⁷⁶ State in Interest of K.P., 709 A.2d 315, 325 (N.J. Ch. 1997).

In Tennessee, this reform effort culminated in the enactment of substantive victims' rights provisions including Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40–38–102(a)(1), which afford crime victims several important, legally cognizable rights throughout the judicial process.⁷⁷ Accordingly, with the overarching goal of protecting crime victims against mistreatment deeply ingrained within Tennessee's constitutional and statutory text, the likelihood that Tennessee's victims' rights provisions will be disregarded in a future case when it comes to filling the coverage gaps left open by *Tennessean's* majority opinion seems vanishingly small.

Conclusion

Whenever Tennessee's victims' rights provisions conflict with a criminal defendant's federal constitutional rights—such as the right to confrontation or the right to a public trial⁷⁸—there is no doubt that victims' rights must bend. As far as the Tennessee Public Records Act is concerned, however, there is also no doubt that Tennessee's victims' rights provisions operate to exempt victims' private records from public disclosure in many instances.

Tennessean expressly recognized two such exemptions: Tennessee Rule of Criminal Procedure 16, which functions to protect crime victims' records from

⁷⁷ See TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

⁷⁸ See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.”).

disclosure throughout the pendency of a criminal case, and Tennessee Code Annotated section 10–7–504(q)(1), which protects certain limited categories of records concerning sexual assault victims from disclosure following a defendant’s conviction.⁷⁹ However, pursuant to Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40–38–102(a)(1), five additional consequences—the likelihood of intimidation, harassment, abuse, indignity, or lack of compassion following the release of a victim’s private records to the public—also provide independent bases for exempting crime victims’ records from public disclosure both before and after a criminal prosecution has concluded.⁸⁰ Consequently, in a future case, it is likely that the three categories of crime victims who were left unprotected by *Tennessean*—(1) victims whose cases do not result in a plea or a conviction, (2) victims whose perpetrators are not convicted of a sexual offense, and (3) victims whose private records are not specifically exempted from disclosure by statute—will ultimately find that their private records are protected from public view under Tennessee’s victims’ rights provisions as well.

⁷⁹ *Tennessean*, 485 S.W.3d at 859.

⁸⁰ See TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

